Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2015

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Uniform Division of Income for Tax Purposes Act (UDITPA) contravenes either the due process or commerce clause of the Constitution of the United States to the extent it requires the inclusion of income from stock investments in apportionable income when these investments are acquired and managed by the taxpayer in connection with its multistate trade or business operations.

2. Whether the apportionment provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA), without modification, contravenes either the due process or commerce clause of the United States Constitution in requiring the apportionment of all business income under the UDITPA three-factor (tangible property, payroll and sales) apportionment formula when business income includes income from investments in stock and when the taxpayer has offered no proof that the formula attributes any net income to the taxing state which is not reasonably related to its instate activities and properties, as required by section 18 of UDITPA.[1]

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[1]Idaho Code (hereinafter called I.C.) § 63-3027(r); 7A Uniform Laws Annotated 106 (1978).

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BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission (hereinafter called the Commission) and participating states in support of the Appellee. Both parties to this proceeding have consented to the filing of this brief.[2]

STATEMENT OF INTEREST

The Commission is the administrative agency of the

[2]Originals of the consent letters have been filed with the Clerk of the Court.

Multistate Tax Compact[3] (hereinafter called the Compact) entered into currently by 19 states (including Idaho) and the District of Columbia as full members, and by 11 states as associate members.[4]

Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (hereinafter called UDITPA).[5] The purpose of UDITPA is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that have adopted it.[6] It has been adopted by a great majority of the income tax states. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of tangible property, payroll and sales (receipts) and specifically allocates "non-business" income, as provided for therein.

Pursuant to its authority under Article VII of the Compact, the Commission has promulgated regulations which implement UDITPA.[7] Approximately 18 states have adopted these regulations substantially in the form as adopted by the Commission.[8]

It is important that UDITPA be interpreted to carry out its purpose to provide for uniformity and full accountability (without duplication) in the division of income for

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[3]For an analysis of its provisions and their operative effect, *see U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976). The purposes of the Compact are to: (1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) Promote uniformity or compatability in significant components of tax systems; (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and; (4) Avoid duplicate taxation.

[4]14 Multistate Tax Comm'n Ann. Rep. 10-13 (1980-1981).

[5]UDITPA was promulgated in 1957 by the National Conference of Commissioners on Uniform State Laws. *See* 7A Uniform Laws Annotated 91 (1978).

[6]*See* Prefatory Note to UDITPA, 7A Uniform Laws Annotated 91-92 (1978).

[7]7 Multistate Tax Comm'n Ann. Rep. 64-84 (1973-1974).

[8]Department of Revenue, State of Indiana, *Results Of A Survey On The Uniformity of State Laws* 4 (1977).

state income tax purposes by workable and rational division of income rules.[9]

The Commission and the states joining in this brief are concerned with ASARCO's position that, under the due process and commerce clauses of the United States Constitution,[10] income from stock (and presumably other income from intangible property), acquired and held in connection with a taxpayer's unitary business, cannot be apportioned, for state income tax purposes, among the various taxing jurisdictions where the taxpayer conducts its unitary business, as required by a reasonable interpretation and application of UDITPA.

More particularly, the Commission and its member states are concerned with ASARCO's novel argument that only the income from investments in the stock of payors, which conduct a unitary business with a payee taxpayer is apportionable, and that, if apportionable, this income must be attributed to the business activities of the payor corporations by modification of the UDITPA apportionment formula. The acceptance of this argument would require this Court to declare the apportionment provisions of UDITPA unconstitutional even though UDITPA requires only reasonable apportionment of the unitary income of a unitary business. The purpose of this brief is to demonstrate that UDITPA, as interpreted and applied by the court below, is constitutional.

COUNTER STATEMENT OF THE CASE

The Commission accepts ASARCO's Statement and Idaho's Counter Statement of The Case except that it *disagrees* with ASARCO's statements pertaining to its relationship with the dividend payor corporations and with its omission of the following important facts: The Idaho Supreme Court found that ASARCO's dividends, capital gains and interest derived from stock investments which

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[9] *See GTE Automatic Elec. v. Allphin*, 68 Ill.2d 326, 369 N.E.2d 841 (1977); Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 748-49 (1957).

ASARCO actively acquired, managed and disposed of, constituted "an integral and necessary part of its mining and smelting business," which was carried on in part in Idaho for the years in question. J.S. at 22a. There is nothing in the record to establish otherwise and ASARCO does not contest this finding. Neither is there anything in the record except ASARCO's irrelevant "separate accounting" argument, J.S. at 30a, to establish that the UDITPA apportionment formula, as applied to ASARCO's total business income, assigned any income to Idaho not reasonably related to ASARCO's conduct of its unitary business in Idaho for the years in question. Thus, the Idaho Supreme Court found that ASARCO had not shown that the UDITPA formula attributed any of ASARCO's extra-territorial values or income to Idaho.

Based on these facts and findings, the Idaho Supreme Court upheld the apportionability of the income in question as "business income," as defined in UDITPA § 1(a),[11] without modification of the UDITPA apportionment formula.[12]

SUMMARY OF ARGUMENT

UDITPA, as interpreted and applied by the Court below is constitutional. This Court has consistently held that the apportionment of the entire net income of a unitary business for state income tax purposes is constitutional in the absence of a showing by clear and cogent evidence that a particular formula results in the taxation of extra-territorial values. *Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931); *Bass, Ratcliff & Gretton Ltd. v. State Tax*

[11] I.C. § 63-3027(a)(1); 7A Uniform Laws Annotated 93 (1978).

[12] The Idaho Tax Commission did include the income from stock and other intangibles in the denominator of the sales factor. *See* J.A. at 73a.

Comm'n, 266 U.S. 271 at 282 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). Furthermore, this Court has applied no different standards where apportionable income or value includes substantial income from or value of stock investments in foreign corporations so long as these investments are related to the unitary business. *Mobil, supra*; *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, *rehearing*, 166 U.S. 185 (1897). Also, this income or value is properly attributable to where the business is conducted as reflected by tangible apportionment factors, such as tangible property (*Adams Express, supra*; *Underwood, supra*; *Bass, supra*), sales (*Beauchamp, supra*), or the three factor formula (*Butler Bros., supra*; *Cleveland Cliffs Iron Co. v. Department of Revenue*, 329 Mich. 225, 45 N.W. 2d 46 (1950)). This simply recognizes that intangibles by their very nature have no fixed geographical situs (*Mobil, supra*; *Curry v. McCannless*, 307 U.S. 357 (1939)); that an apportionment formula does not purport to situs income or property (*Moorman, supra*); and that the most reasonable way to assign intangible values, without duplication, is by the apportionment method (*Mobil, supra*; *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952)).

In conformity to the above constitutional standards, the court below properly upheld the apportionability of the income from the stock investments in question, along with all other income connected with the taxpayer's unitary business, by the general three-factor UDITPA apportionment formula.

ASARCO's argument that the lower court erred in its opinion is based on many fallacious factual assumptions and an erroneous interpretation and application of *Mobil, supra* and *Japan Line Ltd. v. Los Angeles*, 441 U.S. 434 (1979). It bases its entire argument on the erroneous assumption that dividends must be attributable to the activities of the payors, for apportionment purposes, which conflicts with *Mobil, supra*, and numerous other decisions of this Court.

ARGUMENT

I. The UDITPA Apportionment Provisions are Constitutional Because These Apportionment Provisions (1) Only Require that Income Related to the Taxpayer's Unitary Business Be Included in Apportionable Income; (2) Apportion This Income by the Well Recognized Three-Factor Apportionment Formula; and (3) Provide for Relief if the Apportioned Income is Not Reasonably Related to the Taxpayer's Instate Business Activities

This case involves the sole question of the constitutionality of the apportionment provisions of UDITPA.[13] Without question, the Idaho Supreme Court reasonably interpreted and applied these apportionment provisions, which merely require the apportionment of business income[14] of a taxpayer to where the business is conducted as reflected by the location of tangible property, payroll and receipts of the business. UDITPA does not classify income into categories for apportionment purposes, such as income from stocks, bonds, notes, dividends, interest, patents, copyrights, royalties, goodwill, business operations, etc. UDITPA, by its express language and as implemented by the Commission's regulations includes in apportionable income all income from property (including intangibles) and activities which are connected with taxpayer's business which it conducts in part in the taxing state.[15] UDITPA does not attribute business income by

[13]I.C. §§ 63-3027(i) to 3027(r); Art. IV of the Compact; UDITPA §§ 9-18 at 71 Uniform Laws Annotated 100-106 (1978).

[14]UDITPA § 1(a) defines business income as:

> income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. (I.C. § 63-3027(a)(1)).

[15]The Commission regulations, adopted by numerous states, includes rental income, gains from the disposition of assets, interest dividends and income from patents and copyright royalties in apportionable business income where the purpose for acquiring or holding the property is related to or incidental to the taxpayer's trade or business operations. (7 Multistate Tax Comm'n Ann. Rep. app. J. at 64-65 (1973-1974)).

"source" rules but, rather by the unitary business principle.[16] Thus, only the income which the taxpayer derives from its unitary business is subject to apportionment, irrespective of its source or classification.[17]

If the UDITPA apportionment formula does not fairly represent the extent of the taxpayer's business activities within the taxing state, the taxpayer may petition for, or the administrator may require, any other income attribution method to effectuate an equitable distribution of the taxpayer's apportionable business income.[18]

The party seeking to invoke these formula adjustment provisions must show that the UDITPA apportionment formula does not reasonably attribute business income to activities of the taxpayer within the state.[19]

This brief will demonstrate why UDITPA, both on its face and as applied by the court below, is constitutional.

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[16]*See Qualls v. Montgomery Ward & Co.*, 266 Ark. 207, 585 S.W.2d 18 (1979); *Times Mirror Co. v. Franchise Tax Bd*, 102 Cal. App. 3d 872, 162 Cal. Rptr. 630 (1980); *Lone Star Steel Co. v. Dolan*, No. 79CA0506 (Colo. App. Sept. 24, 1981), *cert docketed*, No. 81 SC 382 (Colo. Sup. Ct. Dec. 4, 1981); *Corning Glass Works v. Department of Revenue*, 616 S.W.2d 789 (Ky. App. 1981); *Ruby Construction Co., Inc. v. Department of Revenue*, 578 S.W.2d 248 (Ky. App. 1979); *Albany International Corp. v. Halperin*, 388 A.2d 902 (Me. 1978); *Montana Dep't of Revenue v. American Smelting & Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978); *Champion Int'l Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 300 (1975); *Tipperary Corporation v. New Mexico Bureau of Revenue*, 93 N.M. 22, 595 P.2d 1212 (Ct. App. 1979), *cert denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974); *Deseret Pharmaceutical Co., Inc. v. State Tax Comm'n*, 579 P.2d 1322 (Utah 1978); *Western Contracting Corp. v. State Tax Comm'n*, 18 Utah 2d 23, 414 P.2d 579 (1966).

[17]*See, e.g.*, cases cited in footnote 16, *supra*; Dexter, *The Business Versus Nonbusiness Distinction Under the Uniform Division of Income for Tax Purposes Act*, 10 Urb. Law. 243 (1978); Dexter, *The Unitary Concept in State Income Taxation of Multistate-Multinational Businesses*, 10 Urb. Law. 181 (1978).

[18]UDITPA § 18; I.C. § 63-3027(r).

[19]*Amoco Prod. Co. v. Armold*, 213 Kan. 453, 518 P.2d 453 (1974); *Donald M. Drake Co. v. Department of Revenue*, 263 Or. 26, 500 P.2d 1041 (1972); *Western Contracting Corp. v. State Tax Comm'n*, 18 Utah 2d 23, 414 P.2d 579 (1966).

II. UDITPA, as Interpreted and Applied by the Court Below, Conforms to Due Process Standards Inasmuch As (1) the Stock Investments in Question and the Income Derived from These Investments Were Rationally Related to ASARCO's Unitary Business Which It Conducted in Part in Idaho; and (2) There is No Showing that the Inclusion of the Income from These Stock Investments in Apportionable Income Resulted in the Taxation of Any Extra-territorial Values or Income.

This Court, has defined the due process limits on the apportionability of net income for state income tax purposes in the following cases: *Underwood Typewriter Co. v. Chamberlain, supra*; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, supra*; *Butler Bros. v. McColgan, supra*; *Northwestern States Portland Cement Co. v. Minnesota, supra*; *Moorman Mfg. Co. v. Bair, supra*; *Mobil Oil Corp. v. Commissioner of Taxes, supra*; *Exxon Corp. v. Department of Revenue, supra.*

Without exception, these cases hold that a state income tax conforms to the due process clause if a taxable "nexus" exists between the tax and the activity and the state net income tax is rationally related to instate activities and sources. In the case of a unitary business conducted only in part in the taxing state, a net income tax is so related if the income from the business is reasonably apportioned. Further, courts presume that income is reasonably apportioned unless the taxpayer carries the burden of proof by clear and cogent evidence that the taxing state's apportionment computation attributes out-of-state values (income) to the taxing state.

Underwood Typewriter Co. v. Chamberlain, supra, upheld the apportionment of the entire net income by a single-factor formula (tangible property) since the record did not establish that the method of apportionment was "inherently arbitrary" or "produced an unreasonable result." 254 U.S. at 121. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, supra,* held likewise. 266 U.S. at 283. In *Butler Bros. v. McColgan, supra,* the Court upheld the

apportionment of the entire net income of the taxpayer by the three-factor formula of tangible property, payroll and sales inasmuch as the taxpayer had not established that "it results in extra-territorial values being taxed," 315 U.S. at 507, or "that income unconnected with the unitary business has been used in the formula," *Id.* at 509. *Northwestern States, supra,* upheld apportionment of the entire net income of the taxpayer against a due process challenge because the apportioned income was related to the instate activities of the taxpayer. 358 U.S. at 464. In upholding Iowa's single factor (sales) apportionment formula, the Court in *Moorman Mfg. Co., supra,* recited two due process restrictions, namely "nexus" and a rational relationship between the income attributed to the taxing state and the apportionment formula values connected with the taxing state. 437 U.S. at 273.

Relying on cases like *Underwood, supra, Butler Bros., supra, Bass, supra,* this Court reaffirmed the foregoing general principles in *Mobil,* 445 U.S. at 436-37, and *Exxon,* 447 U.S. at 219-20. The unequivocal holding of these cases, including *Mobil,* is that due process is satisfied if state income taxes are imposed on net income arising in connection with a taxpayer's unitary business a part of which is conducted in the taxing state. Further, they are so related in the case of a multi-jurisdictional business if: (1) the state employs an apportionment formula which apportions the net income which the taxpayer derives from its unitary business operations; and (2) the taxpayer has not established by clear and cogent evidence that the formula attributes extra-territorial values or income to the taxing state. Due process requires no more. Nevertheless, on authority of *Mobil, supra,* ASARCO contends that the inclusion of income from investments in stocks in apportionable income raises additional due process issues. We will next address this contention.

III. Mobil Did Not Limit the Apportionability of Dividends to Dividends Received by a Payee Corporation from Payor Corporations Which Conducted a Unitary Business with the Payee Corporation:

Mobil Supports the Apportionability of All Income Related to or Held in Connection with the Taxpayer's Unitary Business.[19]

Consistent with the above authorities, *Mobil* held that due process apportionability limitations are satisfied if dividends derive from stocks related to the taxpayer's own unitary business conducted in part in the taxing state. The issue in *Mobil* was limited to the question of,

> whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method. 445 U.S. at 435.[20]

The Court discerned only two factors which Mobil contended would differentiate dividend income from operating income, namely, the alleged "foreign source" of the income and the fact that the income was dividend income. 445 U.S. at 438.The Court equated Mobil's "foreign source" due process argument with an effort by Mobil to "separately account" for dividends by ascribing to them a geographical "source" for apportionment purposes. The Court rejected this argument on authority of *Butler Bros. v. McColgan, supra*; *Ford Motor Co. v. Beauchamp,*[21] *supra*; *Moorman Mfg. Co. v. Bair, supra*; *Bass, Ratcliff &*

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[19]For a comprehensive analysis of *Mobil, supra,* see Dexter, *Tax Apportionment of the Income of a Unitary Business: An Examination of Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 1981 B.Y.U.L. Rev. 107 (1981) and the *amicus curiae* brief of the Multistate Tax Commission in the proceedings before the Idaho Supreme Court in this cause on remand from this Court. For an analysis of the alternatives available for the attribution of net income from intangible properties, see Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations,* 29 Vand. L. Rev. 401 (1976), cited in *Mobil,* 445 U.S. at 439 n.14 and his amicus brief in *Mobil.*

[20]Since the Court found that Mobil did not question the accuracy or fairness of Vermont's apportionment formula, but rather elected to attack the tax base, *Mobil* did not consider, "whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that state." 445 U.S. at 434.

[21]*Ford Motor Co. v. Beauchamp, supra,* held that a proportionate value of Ford Motor Company, far in excess of the value of tangible

Gretton, Ltd. v. State Tax Commission, supra, "so long as the intrastate and extrastate activities formed part of a single unitary business." (*Id.* at 438).

In disposing of the "form of dividends" argument, the *Mobil* Court did not differentiate dividends, for due process purposes, from any other class of income. It clearly did not limit the apportionability of dividends to situations in which the payor corporations and the payee corporation are engaged in a single unitary business. *Mobil* upheld the apportionment of Mobil's dividends from ARAMCO in which corporation it owned only a 10% stock interest. Because this limited ownership is less than 50%, it precludes a finding that Mobil conducted a unitary business with ARAMCO. Inasmuch as Mobil's investment in ARAMCO stock assured Mobil of a supply of crude oil in its petroleum business, ARAMCO dividends were clearly apportionable for due process purposes because Mobil's ARAMCO stock investment was related to Mobil's petroleum business, which it conducted in part in Vermont. (In the case at bar, the court below found that the activities of the dividend payor corporations were definitely related to ASARCO's activities in Idaho. J.S. at 22a-23a).

Obviously, apart from the unitary ties between the business of a payee corporation and that of payor corporations, a relationship can exist between stock investments and the business of the payee corporation which is sufficient to justify the apportionment of income from intangibles. *The key question as to the apportionability of income under UDITPA is: Whether the income is derived from investments made in connection with the taxpayer's unitary trade or business?*[22] As *Mobil*

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properties located in Texas, could be attributable to Texas for net worth franchise tax purposes because "In a unitary enterprise, property outside the state necessarily affects the worth of the privileges within the state." (*Id.* at 336). See references to *Butler Bros.* and *Moorman,* at 4, 8, 9, 11, *supra. Cf. Flint v. Stone Tracy Co.,* 220 U.S. 107, 166 (1911).

[22]To construe the due process clause to require that a particular class or source of net income must be specifically related to the taxpayer's unitary business operations, as provided for in UDITPA,

indicates, the relationship of the business of the payor to the business of the payee taxpayer can be relevant in determining whether the income from stock investments should be included in apportionable income. However, the business relationship between the payor and payee is not controlling. A taxpayer might make a stock investment for many related purposes, such as to obtain a market for its product or to establish a source of supply. Such considerations are relevant, however, only to determine if an investment is related to the unitary business of the taxpayer.[23] Other considerations, such as the relationship of intangibles to the overall business, are equally important. *See Ford Motor Co. v. Beauchamp, supra*; *Flint v. Stone Tracy Co., supra.*

In sum, *Mobil* supports the proposition that all "net income" received from stock and other investments held in connection with or for a purpose related to the payee's unitary business operations is subject to apportionment.[24]

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before it can be apportioned, may be too restrictive so long as the apportionment result is reasonable. The reason this may be so is that, without such a specific tie-in, the apportionment of the entire net income of a corporation to the state still may be a reasonable measure of the corporate privileges and activities within the state. For example, if State A imposes a corporate privilege tax measured by apportioned federal taxable income, is due process satisfied if that measure is not shown to unreasonably measure instate corporate presence and activities? *See, e.g., In re Goodyear Tire & Rubber Company, Corporate Income Tax 1966, 1967, 1968,* 335 A.2d 310 (Vt. 1975). An additional reason is that the inclusion of an item in apportionable income does constitute the taxation of that item or of its source. *See N.Y. ex rel. Cohn v. Graves,* 300 U.S. 308, 312 (1937); *Peck & Co. v. Lowe,* 247 U.S. 165 (1918); *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1910). In any event, it is clear that the UDITPA apportionment rules are well written within due process limits.

[23]For example, most of the corporations in the list at footnote nine of the *Mobil* dissent, 445 U.S. at 456, are not in the same kind of business as Mobil and are not controlled by Mobil. However, if Mobil's investments in the stock of these listed public utilities corporations were made by Mobil to insure sources of supply of energy for use in Mobil's petroleum business, there is a sufficient relationship between such stock investments and Mobil's petroleum business to support apportionability of the dividends received by Mobil from these investments.

[24]This conclusion is amply justified given the history of the taxation of intangibles, the abstract nature of a net income tax, the lack of any

Nothing in the due process portion of *Mobil* would invalidate the apportionment of dividends as "business income" as defined in UDITPA § 1(a).[25]

Various decisions of this Court, including those relied on in *Mobil*, support the foregoing interpretation of *Mobil*.[26]

Consistent with this interpretation, all of the apportionment cases relied on in *Mobil* and *Exxon, supra*, dealt with the unity of a single corporation and upheld the apportionment of the entire property, values or income attributable to or arising in connection with the unitary business of a single corporation. The same is true concerning many state income tax cases which have applied the unitary concept in determining the apportionability of income from intangibles.[27] Nothing in *Mobil* conflicts with these cases. This was affirmed beyond any question by *Exxon, supra*.

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fixed situs for intangible properties, and the fact that apportionment does not attempt to situs income to any source. *See* Dexter, *The Attribution of Net Income of Multistate-Multinational Corporations for State Taxes On or Measured By Net Income* in 1 Multistate Tax Comm'n Review No. 1 at 5 (Nov. 1981).

[25]Section 1(a) of UDITPA, as illustrated by the case of *Montana Dep't of Revenue v. American Smelting and Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978), simply requires a tie-in between the taxpayer's unitary business operations and the taxpayer's stock investments from which dividends are derived.

[26]*See, e.g., Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 245 U.S. 113 (1920); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, *rehearing*, 166 U.S. 185 (1897).

[27]*See, e.g., International Harvester v. Department of Taxation*, 322 US. 435 (1944); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940); *Qualls v. Montgomery Ward*, 266 Ark. 207, 585 S.W.2d 18 (1979); *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal.2d 214, 238 P.2d 569 (1951), *appeal dismissed*, 334 U.S. 939 (1952); *Appeal of W. J. Voit Rubber Co.*, 1 Cal. Tax Cas. Rep. (CCH) ¶ 12-402.872 (SBE May 12, 1964); *Albany International Corp. v. Halperin*, 388 A.2d 901 (Me. 1978); *W. R. Grace & Co. v. Commissioner of Revenue*, ___ Mass. ___, 393 N.E.2d 330 (1979); *Montgomery Ward & Co. v.*

The foregoing interpretation of the due process clause portion of *Mobil* is supported by the commerce clause portion of *Mobil*.[28] In holding that dividends were subject to apportionment within commerce clause limitations, this Court stated in Mobil:

> Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained. See *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952). We find no adequate justification, however, for such a preference. . . . *The Court also has recognized that "the reason for a single place of taxation no longer obtains" when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. Curry v. McCanless*, 307 U.S. 357, 367 (1939). Emphasis added; (445 U.S. at 444-45).

Mobil then noted, 445 U.S. at 446, that "when the dividends reflect income from a unitary business, part of which is conducted in other States. . . . the income bears relation to benefits and privileges conferred by several States." and that "[t]hese are the circumstances in which apportionment is ordinarily the accepted method." *Id.* Clearly, the commerce clause portion of *Mobil* refers only to the utilization of intangibles in the unitary business of the payee taxpayer.

Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965), *appeal dismissed*, 384 U.S. 718 (1966); *Montana Department of Revenue v. American Smelting and Ref. Co.*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978); *F.W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J. 466, 213 A.2d 1 (1965); *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 54 P.2d 1330 (1975); *Sperry Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974); *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A.2 310 (1975); *F.W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

[28] Inasmuch as due process and commerce clause issues are interrelated, *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 353 (1944), disposition of the commerce clause issue in *Mobil* is relevant for due process purposes.

IV. To Condition the Constitutionality of the Inclusion of Income from Stock Investments Upon a Finding that the Investments are in Corporations Which Conduct a Unitary Business with the Investor is Illogical and Should Not be Read into Mobil.[29]

Reg. IV.1.(c)(4) of the Commission UDITPA regulations sets forth the following examples of apportionable dividend income under UDITPA:

> Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are business income.
>
> Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business operations consist solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing business. The dividends are business income.
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> Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to

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[29]Although contrary to its due process argument, ASARCO concedes that, "There may be situations . . . in which it would be appropriate to focus only on the taxpayer's own activities, without regard to the underlying activities of the company paying the dividends" to determine the constitutionality of the apportionment of dividends. Appellant's Br. at 18 (footnote omitted). ASARCO fails to note, however, what constitutional standard could be employed to distinguish such situations from this case. We are aware of none except the unitary business principle.

current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are business income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are business income.[30]

Although these examples are not exhaustive, they are obvious illustrations of investments in stocks made for purposes clearly associated with the taxpayer's unitary business operations.

The foregoing examples are not constitutionally distinguishable from Mobil's investment in ARAMCO stock and presumably its miscellaneous investments, the dividends of which were held apportionable in *Mobil*. In each instance, the controlling question is: Was the investment made in furtherance of the taxpayer's unitary trade or business? If it was, due process for apportionment purposes is satisfied.

V. Mobil Did Not Require the Court Below to Modify its Holding that the UDITPA Apportionment Factors, Without Modification, Constitutionally Apportioned ASARCO's Apportionable Income, Including Income from Its Stock Investments in Question,[31] Since ASARCO Has Failed to Establish that the Apportionment Results are Unreasonable.

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[30]7 Multistate Tax Comm'n Ann. Rep. app. J at 68 (1973-1974); Idaho Reg. 27.IV.1.(c)(4). The foregoing examples simply apply the regulation test for apportionability of dividends: "Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations." *Id.*

[31]Since ASARCO takes the position that only dividends from payor corporations, which conduct a unitary business with the payee, are subject to apportionment and since no such unitary business is here involved, ASARCO's argument in regard to modification of the UDITPA

Since Mobil did not contest the reasonableness of the Vermont three-factor apportionment formula in *Mobil*, this Court did not pass on this question. 445 U.S. at 434. However, *Mobil* does not change one *iota* ASARCO's burden to establish by clear and cogent evidence that the UDITPA apportionment formula, as applied in here, taxed any extra-territorial income or values of ASARCO.[32] The *Mobil* court reaffirmed this test when it noted that Mobil had not proved that its Vermont income tax liability was "out of all appropriate proportion to the business of Mobil transacted in that State [Vermont]." 445 U.S. at 437. Thus, the UDITPA formula is not required to be modified to conform to due process standards unless the formula, as applied, is shown to tax extra-territorial values or income, which is not the case here.

Notwithstanding this, ASARCO argues that there is something peculiar about income from stock which triggers a different due process test than the clear and cogent evidence rule to determine the validity of an apportionment result. ASARCO argues that the inclusion of dividends in apportionable income under the UDITPA three-factor formula is "inherently arbitrary" as a matter of due process. Appellant's Br. at 37. ASARCO premises this argument on analogy to the results obtained by the combined reporting method. However, this argument is based on the fallacious assumption that the dividends in question were received from corporations with which it conducts a unitary business. But, the court below found that the payee corporations were not conducting a unitary business with ASARCO. J.S. at 20a-22a. Therefore, ASARCO's reliance on "combined reporting" results and Justice Stevens' dissent in *Mobil*, is totally misplaced. Fur-

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apportionment factors (Appellant's Br. at 27-37) is irrelevant here. It is also irrelevant since Idaho permits and requires combined reporting. Thus, consistent with the unitary business principle, Idaho would apportion the combined net income of the unitary business in accordance with the combined factors of the unitary business as suggested by Justice Stevens in his dissent in *Mobil*. (445 U.S. at 461-62).

[32] *See, e.g., Exxon, supra*; *Moorman Mfg. Co. v. Bair, supra*; *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682 (1936); *Hans Rees' Sons, Inc. v. North Carolina, supra.*

thermore, if a "combined reporting" result is the constitutional standard to determine the reasonableness of an apportionment formula where dividends are received from subsidiaries which conduct a unitary business with the dividend payee, then ASARCO should argue that the combined reporting standard controls to determine the reasonableness of the apportionment result in question. It does not do so. Neither does it proffer any evidence to show what a combined report would attribute to Idaho as compared to the apportionment results it here challenges. Rather, ASARCO agrees with the position of the appellant in *Chicago Bridge & Iron Company v. Caterillar Tractor Co., prob. juris. noted,* No. 81-349, that combined reporting is unconstitutional. Appellant's Br. at 31, n.25.

Nevertheless, ASARCO further argues that the payor's factors should be included in the denominator of the payee's factors in the ratio of the dividends to the current net income of the payors. Appellant's Br. at 27-37. It bases this argument, if otherwise relevant, on two invalid assumptions: First, that the apportionability of dividends, without apportionment factor adjustments, attributes more net income to the taxing state than "combined reporting." Second, that a "combined reporting" result is equivalent to the apportionability of dividend income that occurs when a portion of the payor's factors (a fraction representing the ratio of the payor's dividends to the payor's net income) are included in the denominator of the payee's factors.

The invalidity of ASARCO's first assumption (that the apportionability of dividends without apportionment factor adjustments attributes more income to the taxing state than "combined reporting") may be illustrated by the following hypothetical examples. Assume that Corporation A conducts a unitary business with its subsidiary Corporation B and assume the following:

Corporation A

	Everywhere	Idaho
Property	1,000	500
Payroll	2,000	2,000
Sales	4,000	—0—
Net operating income:		$300.00
Dividends from Corp B:		300.00
Total taxable income		$600.00

Corporation B

	Everywhere	Idaho
Property	500	100
Payroll	1,000	300
Sales	6,000	600
Net operating income:		$600.00
Income tax liability:		300.00
Net distributable income		$300.00*

*It is assumed that $300 is paid to discharge income tax liabilities and thus is not available for distribution as dividends. This is a reasonable assumption based on the combined net income tax rates of the federal government and the states as well as the prevailing rates in foreign countries.

Under the foregoing assumptions, if Corporation A's tax liability to Idaho is determined on a *separate entity basis* with the total distributable dividends included in apportionable income, its Idaho taxable income would be $300.00, computed as follows:

$$\left.\begin{array}{ccc} \text{Property} & \text{Payroll} & \text{Sales} \\ \frac{500}{1{,}000} & \frac{2{,}000}{2{,}000} & \frac{0}{4{,}000} \end{array}\right\} = \tfrac{1}{2} + 1 + 0 \div 3 = \tfrac{1}{2} \times \$600 = \$300.$$

If Corporation A's tax liability to Idaho is determined on the basis of a *combined report*, the Idaho taxable income would still be exactly $300, computed as follows:

Total combined net operating income = $900.00 (The $300.00 intercorporate dividend is eliminated in a "combined report.")

Idaho factors:

Property	Payroll	Sales	
500/1,500	2,000/3,000	0/10,000	= ⅓ + ⅔ + 0 ÷ 3 = ⅓ x $900 = $300.

While the foregoing example illustrates, based on the assumptions in the example, that there is an equivalence between separate entity reporting with dividends in apportioned income and "combined reporting" with intercorporate dividends eliminated, a variation in the factual assumptions demonstrates that equivalence between separate entity reporting and combined reporting would rarely occur. This can be illustrated by changing some of the factual assumptions in the foregoing example:

1. Assume Corp. A sells its products at cost to its subsidiary, Corp. B, so that (as was the case in *Mobil* for the two years in question) Corp. A had no taxable net operating income. The $900 total net operating income would then be attributable to Corporation B by "separate accounting." Under *separate entity reporting,* assuming Corp. A received the $450 of distributable income as dividends, this would result in apportioning $225 of Corp. A's income to Idaho (separate entity reporting factor of ½ x $450 = $225); under *combined reporting,* $300 would be apportioned to Idaho (combined reporting factor of ⅓ x $900 = $300).

2. Assume Corp. A attributes all the net operating taxable income to itself by separate accounting. It would thus realize $900 net operating income. Corp. B would have no profits out of which it could pay dividends to Corp. A. Corp. A would then have $450 total taxable income in the state on a separate entity basis (½ x $900 = $450) versus $300 computed on a "combined reporting" basis (⅓ x $900 = $300).

3. Assume Corp. B paid dividends of $450 to Corp. A ($150 out of previous undistributed earnings and profits). Corp. A's tax liability on a separate entity basis would be then $375 (½ x $750 = $375) to Idaho with dividends apportionable. This result, which is clearly different than the results in variations 1. and 2. above, further erodes appellant's position.

In sum, the above examples clearly illustrate that, contrary to ASARCO's argument, the results from apportionability of dividends without apportionment factor adjustments is not analogous to the results from "combined reporting."

ASARCO's second assumption, that an equivalence exists between a combined report and the inclusion of the payor's factors in the payee's denominator, is also without merit. Under the foregoing example, ASARCO's position is that a portion of Corp. B's factors (representing the ratio of Corp. B's dividends to Corp. B's income or one-half in above example) should be added to Corp. A's factors. In accordance with ASARCO's position, Corp. A's income tax liability to Idaho would be computed as follows: Corp. A's income equals $600.00. The ratio of Corp. A's Idaho factors compared to the total of Corp. A's factors everywhere plus one-half of Corp. B's factors everywhere is 2/5, computed as follows:

Property	Payroll	Sales	
500 / 1,250	2,000 / 2,500	0 / 7,000	= 2/5 + 4/5 + 0 = 6/5 ÷ 3 = 2/5

Idaho taxable income equals 2/5 x $600 = $240.

ASARCO's argument that inclusion of the payee's factors yields a result analogous to a "combined reporting" result is thus fallacious: A "combined report" result yields Idaho taxable income of $300 and ASARCO's method yields Idaho taxable income of only $240.

Following the format in the examples above, variations in the factual assumptions will further demonstrate the invalidity of ASARCO's claimed equivalence between the results of a combined report and the results from ASARCO's method of including the payor's factors in the payee's denominator:

1. If Corp. B's net operating income is assumed to be only $150, and dividends to A are thus reduced to $75, Corp. A's total taxable income would be $375 (including the dividends), and under ASARCO's proposal $150 would be attributable to Corp. A (2/5 x $375 = $150). This result is identical to complete exemption of Corp. B's $75.00 divi-

dends to Corp. A on a separate entity basis (½ x $300 of net operating income = $150).

2. If Corp. B's net operating income is assumed to be $100 and Corp. B's dividends to Corp. A are $50, Corp. A's liability to the taxing state would be $140 (2/5 x $350 = $140). Thus, the state loses $10 in income taxes by including Corp. A's dividends in its apportionable income as compared to completely exempting dividends and apportioning only the $300 net operating income on a separate entity basis.

In sum, tax consequences which follow from the apportionability of dividends have no direct relationship to the tax consequences of "combined reporting" and neither of these methods has the same tax consequences which follow from inclusion of a portion of the payor's factors in the denominator of the payee's apportionment formula if dividends are included in apportionable income. ASARCO's conclusion, that the inclusion of dividends in apportionable income is "inherently arbitrary" based on its argument in pages 27-37 of its brief, thus has absolutely no validity.

Because the *Mobil* Court was properly concerned with the validity of the apportionment results, this Court appropriately denied Mobil any relief in the absence of Mobil specifically raising this issue and proving its case in accordance with well recognized constitutional standards which have been carefully developed by this Court in numerous apportionment cases. ASARCO is here entitled to no more.[33]

In conformity with these standards, the drafters of UDITPA clearly recognized that the UDITPA

[33]We are not here suggesting that, on an appropriate factual showing under UDITPA § 18, the inclusion of dividends in apportionable income may not require an adjustment of the apportionment factors. Neither are we suggesting that due process considerations may not require the use of the "combined reporting" method for state income tax apportionment purposes where a unitary business is conducted by a group of affiliated corporations to test the reasonableness of an apportionment formula. However, the validity of apportionment results, irrespective of the classes of income included in apportionable income, cannot be determined by abstract arguments based on hypothetical circumstances.

apportionment formula may produce inequitable results. To meet this contingency, they included the relief provisions in UDITPA § 18.[34] However, as heretofore indicated, these relief sections can be invoked only by a proper factual showing by a party relying on its provisions. ASARCO has made no such showing; ASARCO chooses to proceed on the assumption that the apportionment of income from stock investments by the UDITPA three factor formula is "inherently arbitrary." Appellant's Br. at 37.

ASARCO premises this argument on two basic misconceptions in addition to its misplaced reliance on combined reporting results. First, it confuses the dividend income of the payee stockholders with the payor corporations' net taxable income for the current year. However, the "source" of dividends is the ownership of stock. ASARCO ignores the fact that stockholders and the corporations in which they own stock are distinct taxable legal entities.[35]

Secondly, ASARCO assumes that it is "inherently arbitrary" to attribute income from intangibles to the unitary business activities of the payee corporation by using the tangible apportionment factors found in UDITPA.[36] As heretofore indicated, UDITPA simply assigns corporate income which is derived from a unitary business to where that business is done as reflected by the location of the tangible properties, payroll and sales (receipts) of that business. Before income is subject to apportionment under UDITPA, irrespective of its character, UDITPA first requires that it be associated in a due process and economic sense with the total business operations, irrespective of where these operations are conducted. UDITPA then simply assigns this business income to the geographical locations where the business is done, as reflected by the location of the tangible property, payroll

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[34] *See* footnote 18, *supra*.

[35] The opinion of the court below and the authorities relied upon adequately address this argument, which merits no further comment here. (J.S. at 27a-29a). *Cf. Hawley v. Madden*, 232 U.S. 1 (1914); *Darnell v. Indiana*, 226 U.S. 390 (1912).

and sales (receipts) of the business. (This business consisted of the business operations of ASARCO and six affiliated corporations.) Thus, in ASARCO's case, its business income, which included its income in question, was apportioned to Idaho on the basis of the Idaho tangible property, payroll and receipts of the business (which included the business of six subsidiary corporations) compared to total tangible property, payroll and receipts of the business everywhere. This resulted in attributing to Idaho for the years in question approximately 2.5% of the business income of the business of ASARCO and its six affiliates which ASARCO conducted in part in Idaho. There is no reason to assume this result is "inherently arbitrary."

In the rehearing of *Adams Express Co. v. Ohio State Auditor, supra,* the Court specifically rejected this assumption in the context of an interstate utility *ad valorem* property tax case. In upholding the state's power to apportion the entire intangibles of a unitary business to the state based on a tangible property factor, the *Adams* Court decided that the situs of intangible property of a unitary business is "wherever its tangible property is located and its work is done." 166 U.S. at 223. In the context of a corporate privilege tax, this Court, in *Ford Motor Co. v. Beauchamp, supra,* reaffirmed this principle and gave constitutional due process support to the economic fact that intangibles related to a unitary business have a significant due process relationship to the entire unitary business and that they may be apportioned by a tangible apportionment factor to where the business is conducted. In *International Harvester v. Department of Taxation,* 322 U.S. 435 (1944) and *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435 (1940), this Court upheld the apportionment of dividends to Wisconsin based on the tangible factors of the payor corporations.

Following the holding of these decisions, to which UDITPA conforms, state courts have uniformly apportioned income from intangibles based on tangible ap-

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[16]*See* UDITPA § 9; I.C. § 63-3027(i).

portionment factors.[37]

Nothing in *Mobil*, conflicts with the apportionment of income from intangibles by using the tangible factors in the UDITPA apportionment formula so long as the tangible apportionment factors distribute the unitary income to where the unitary business is conducted. The concern in *Mobil* was limited to the circumstances where: (1) a unitary business was presumed to have been conducted by a group of corporations; (2) combined reporting was not permitted; and (3) the apportionment factors were limited to those of only one member of the unitary group. Although these circumstances may well trigger the need for apportionment relief in accordance with "combined reporting" standards, or comparable standards, such circumstances do not exist in this case. The Idaho Code specifically provides for "combined reporting." I.C. § 63-3027(s). "Combined reporting" was permitted in this case to the extent that ASARCO was found to have conducted a unitary business with affiliated corporations. Also, all of the tangible property, payroll, and receipts of the unitary combined group were included in the apportionment factors and the income from intangibles was included in the denominator of the sales factor.[38] No relevant evidence was introduced to establish that this apportionment result was unreasonable. Thus, ASARCO has failed to establish the unconstitutionality of the UDITPA apportionment formula as applied in this case.

VI. The Inclusion of Dividends of ASARCO from M.I.M. and Mexicana in Apportionable Income is in Conformity with Commerce Clause Limitations.

ASARCO argues that, on the basis of *Japan Line*

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[37]*See* cases cited in footnote 16, *supra*; *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipe Line Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965); *F.W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J. 466; 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

[38]*See* J.A. at 73a.

Ltd., supra, the commerce clause precludes the inclusion of its dividends from M.I.M. and Mexicana in apportionable income. This argument is based on at least six false assumptions.

ASARCO's first false assumption is that *Japan Line* is relevant to state income taxes. *Mobil* holds otherwise:

> Appellant's attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax. (445 U.S. at 448).

The second false assumption is that the state income tax system is not independent of, and in addition to, the federal system. Yet, in *Mobil,* this Court noted:

> Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. (*Id.*).

Constitutionally, since states are neither required to give either a credit nor a deduction for any federal income taxes, it is inconceivable that they should somehow be required to take into account a federal income tax credit which is allowed for withholding taxes on dividends paid to a foreign country by the dividend payor corporations.

The third false assumption is that there is an established international policy which prevents any duplicate taxation of net income between nations and that the inclusion of dividends from "foreign sources" conflicts with this policy. No such policy exists.[39]

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[39]*See, e.g.,* Hadari, *Tax Treaties and Their Role in Financial Planning of the Multinational Enterprise,* 20 Am. J. Comp. Law 111 (1972) and authorities cited therein. The author there concludes:

> Multiple taxation is the natural result of the circulation of income from the foreign subsidiary . . . to the parent corporation, and from it to the shareholders all over the world.
>
> . . . .
>
> Until countries significantly elaborate their tax treaty programs, we must agree with Professor Raymond Vernon's

ASARCO's fourth false assumption is that ASARCO, unlike Mobil in *Mobil*, has established that its dividends have in fact been subjected to international double taxation. As the court below properly concluded, the record is void of any such evidence. Citation of isolated provisions of foreign tax laws is not proof of multiple taxation here any more than it was in *Mobil*. J.S. at 32a.

The fifth false assumption of ASARCO is that the practice of crediting low-rate foreign withholding taxes on dividends for federal tax is somehow a justification for the exclusion of these dividends from a state tax base[40] and that it evidences an international policy to source dividends to the country of the payor corporation. This hardly squares with the low rates on withholding taxes which are contained in tax treaties and otherwise.[41] These low rates would appear to, in substance, "source" dividends primarily in the country of the dividend recipient.

ASARCO's sixth false assumption is that the inclusion of dividends in apportionable income is the taxation of "foreign source" income. The fact is, as recognized by this Court in *Mobil, supra*, and *Moorman Mfg. Co., supra*, that an apportionment formula does not attempt to "source" net income geographically. In comparing apportionability of income by the unitary business principle with the sourcing of income by separate

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conclusion that "Tax payments made by multinational enterprises are a matter of bookkeeping, chance, and the vigilance of national tax authorities." (*Id.* at 144-45; footnotes omitted).

[40]Given the low rate of foreign withholding taxes on dividends as compared to normal tax rates of the country in which the payor corporation is located, ASARCO offers no solution as to how the states could devise their tax systems to prevent any so-called "double taxation" to conform to ASARCO's construction of the commerce clause. (Appellant's Br. at 45-48).

[41]For example, Art. 10 of the Organization for Economic Cooperation and Development (OECD) 1963 Draft Double Taxation Convention on Income and Capital prescribes a 5% rate of withholding on dividends paid to a corporation which owns at least 25% of the capital of the dividend payor corporation. This represents a nominal rate as compared to general rates of taxation by the principle nations of the world.

accounting, ASARCO is attempting to compare the uncomparable.

CONCLUSION

Apart from its erroneous interpretation of *Mobil* and *Japan Line*, ASARCO has cited no case that remotely supports its novel argument that UDITPA, as interpreted and applied in this case, is unconstitutional under either the due process clause or commerce clause. Therefore, it is respectfully submitted that this Court should affirm the judgment of the Idaho Supreme Court.

Respectfully submitted,

/s/_____

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